

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE MICHAEL TATUM,

Defendant-Appellant.

UNPUBLISHED

October 20, 2005

No. 256227

Lenawee Circuit Court

LC No. 04-010805-FH

Before: Cavanagh, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for third-degree criminal sexual conduct, MCL 750.520d(1)(a). We affirm.

On appeal, defendant first argues that he was denied his constitutional rights to due process of law and a fair trial by the prosecutor's misconduct. We disagree. Because defendant failed to preserve his several claims of misconduct by proper objection, our review is for plain error that affected his substantial rights. See *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Generally, prosecutors are afforded great latitude regarding their arguments and conduct and are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Here, however, defendant claims that the prosecutor improperly vouched for the credibility of the victim through the testimony of the victim's counselor and a police officer, as well as during closing argument. A prosecutor "cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Id.* at 276. We have reviewed the contested statements in context and reject these arguments. Defendant's claim was that the victim had "told many different stories to many different people" and that "the stories continue to change." In response, the prosecution questioned the counselor and the officer as to whether there were such inconsistencies in the victim's "story." It was not implied to the jury that the witnesses, or the prosecutor, had special knowledge that the witness was being truthful. And, the prosecution may respond to the defense's arguments. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

Next, defendant argues that the prosecutor committed misconduct by appealing to the jury's sympathy for the victim during closing argument. A prosecutor is not permitted to appeal to the sympathy of the jurors for the victim. *Watson, supra* at 591. Here, the prosecutor argued that, although members of the jury may have responded differently to defendant's attack, they should only consider whether the elements of the crime were proven. He asked the jury not to "victimize her a second time." Although we are inclined to conclude that such an appeal is inappropriate and would caution the prosecutor from a "re-victimization" approach in closing argument, here, the reference, considered in context, was fairly brief and appears to be an effort to direct the jury to focus on the elements of the crime. Further, we cannot conclude that defendant was denied a fair and impartial trial or that any such error was outcome determinative. See *Thomas, supra*; *Watson, supra*.

Defendant next claims that it was improper for the prosecution to argue that force was used against the victim in the perpetration of the alleged crime since the elements of the charged crime do not require force and, thus, the prosecution's argument amounted to accusing defendant of uncharged conduct. We disagree. Prosecutors may not make statements of fact to the jury that are unsupported by evidence, but they are free to argue the evidence as it relates to their theory of the case. *Watson, supra* at 588. Here, in her description of the crime, the victim testified that force was used; thus, the use of force was a relevant surrounding circumstance of its commission. The prosecutor did not use this testimony in a vacuum as substantive evidence to establish defendant's guilt for the charged, or any uncharged, crime but was merely commenting on the evidence. This action did not constitute misconduct.

And, defendant claims that the prosecution denigrated defendant and defense counsel by arguing that they were not taking the victim seriously. "[A] prosecuting attorney may not personally attack defense counsel." *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003). Prosecutors may not express their personal opinions on a defendant's guilt, or denigrate a defendant "with intemperate and prejudicial remarks." *Bahoda, supra* at 282-283 (internal citations omitted). We have reviewed the brief comment in context and, in light of the defense's repeated attacks on the victim's credibility, conclude that there was no misconduct.

Defendant next claims that he was denied the effective assistance of counsel because his attorney failed to object to the alleged instances of prosecutorial misconduct. We disagree. Because a hearing was not conducted pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To establish ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different thus the proceedings were unfair or unreliable. See *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Here, defendant has failed to rebut the presumption that he received the effective assistance of counsel. None of the claims of prosecutorial misconduct had merit. Therefore, defense counsel's performance did not fall below an objective standard of reasonableness in failing to object to any of the alleged instances of misconduct.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Michael R. Smolenski

/s/ Brian K. Zahra